Supreme Court, U. S.
FILED
JAN 3 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-872

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., ET AL.,
Petitioners

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL., *Respondents*

On Railroads' Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., BERGSTROM PAPER COMPANY, COMMERCIAL METALS COMPANY, FRANKEL BROS. & CO., INC., H. DAVIS & SON, INC., RSR CORPORATION AND U. S. REDUCTION COMPANY

EDWARD L. MERRIGAN,
Attorney for
Respondents NARI, et al.
6000 Connecticut Avenue, N.W.
Washington, D.C. 20015

January 3, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

CASES AND ADMINISTRATIVE PROCEEDINGS:

Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-872

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., ET AL., *Petitioners*

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL., *Respondents*

On Railroads' Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., BERGSTROM PAPER COMPANY, COMMERCIAL METALS COMPANY, FRANKEL BROS. & CO., INC., H. DAVIS & SON, INC., RSR CORPORATION AND U.S. REDUCTION COMPANY

This brief in opposition to the railroads' petition for writ of certiorari is respectfully filed on behalf of respondents National Association of Recycling Indus-

tries, Inc. (NARI), Bergstrom Paper Company of Neenah, Wisconsin, Commercial Metals Company of Dallas, Texas, Frankel Bros. & Co., Inc. of Rochester, New York, H. Davis & Son, Inc. of Toledo, Ohio, RSR Corporation of Dallas, Texas and U.S. Reduction Company of East Chicago, Indiana.

NARI is the trade association for the nation's aluminum, copper, lead, zinc, wastepaper, textile and rubber recycling industries. Organized more than 65 years ago, NARI's membership consists of more than 850 firms located throughout the United States, all of which are engaged in the collection, processing or industrial utilization of the aforementioned recyclable solid waste materials. The other respondents listed above are members of NARI, and each finds it necessary regularly to utilize the nation's railroads in the course of its collection, processing, purchase or sale of one or more of said recyclable materials. These respondents were thus parties in *Ex Parte 319—Investigation of Freight Rates and Charges for the Transportation of Recyclable or Recycled Materials*, an investigation proceeding conducted by the Interstate Commerce Commission pursuant to Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210, Title II, § 204, 2/5/76, 90 Stat. 40; 45 U.S.C. 793 note). They were also parties to all proceedings before the United States Court of Appeals for the District of Columbia Circuit in *National Association of Recycling Industries, Inc.* v. *Interstate Commerce Commission*, 585 F.2d 522, the decision in which led to the railroads' petition for certiorari in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B) is officially reported at 585 F.2d 522. The Court of Appeals' order and opinion of October 16, 1978 (Pet. App. C), rendered in response to NARI's petition for rehearing and modification, is also reported at 585 F.2d 522.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. E) was entered on August 2, 1978. Mr. Chief Justice Burger extended the time for filing the petition for certiorari to November 30, 1978, but denied the railroads' motion for a stay of the Court of Appeals' orders. Petitioners invoke this Court's jurisdiction under Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Respondents strongly disagree with petitioners' erroneous description of the questions presented by this case. Thus, pursuant to the provisions of Rule 40(3) of the Supreme Court Rules, they restate the questions presented as follows:

1. Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 793 note) directed the Interstate Commerce Commission to conduct an expedited investigation of the railroads' freight rate structures and to remove all rates for the movement of recyclable materials not proved by the railroads to be just, reasonable and nondiscriminatory. The Commission conducted an investigation (*Ex Parte 319—Investigation of Freight Rates for the Transportation of Recyclable and Recycled Materials*), but by a sharply-divided 5 to 3 decision failed to make any

meaningful, effective changes in the rates for recyclables. In response to a petition for review, pursuant to which both the United States and representatives of the national recycling industry broadly challenged the Commission's decision as unlawful, the Court of Appeals for the District of Columbia Circuit unanimously ruled that the Commission's decision did not represent reasoned compliance with the Congressional mandate contained in Section 204 of the 1976 Act.

Having made this unanimous determination, did the Court of Appeals correctly vacate the Commission's decision and remand the case to the Commission for full, lawful compliance with the statutory directives of Section 204?

2. *Five years ago*, in Section 603 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 793), Congress directed the Interstate Commerce Commission to eliminate all freight rate discrimination against the transportation of recyclable materials *"by expedited proceedings."* The Commission largely ignored that statutory directive, so *three years ago*, Congress enacted a *second* statutory directive which ordered the Commission to rectify all unjust, unreasonable, discriminatory freight rates for recyclable materials *within one (1) year from February 5, 1976*. Again, the Commission failed lawfully to comply, so in late 1978 the Court of Appeals had to remand the entire case to the Commission for lawful compliance with the Congressional mandates.

Under such circumstances, did the Court of Appeals correctly endeavor to give belated force and effect to the two Congressional directives for *expedited action* by requiring the Commission expeditiously to complete

the remand proceedings within six (6) months from October 16, 1978?

3. The Interstate Commerce Commission has *not* filed a petition for certiorari in this case, but rather has proceeded expeditiously to endeavor to comply with the Court of Appeals' orders. Considering the overwhelming importance Congress has twice placed on the need for an *expedited* final decision on the question of whether the railroads' freight rates for the movement of recyclable materials in the United States are lawful, just, reasonable and nondiscriminatory, should this Court interfere with and delay the statutory process at this time when the entire case will be subject to full judicial review again when the Commission renders its final decision in the remand proceedings?

A subsidiary question is whether, absent any complaint from the Commission itself in the form of a petition for certiorari, do the railroads have any standing, under the facts and circumstances of this case, to cause this Court to attempt to determine solely whether the Court of Appeals' orders herein somehow involve judicial usurpation of "substantive or procedural authority reserved to the Commission"?

STATUTES INVOLVED

Section 603 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 793) and Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 793 note).

STATEMENT OF FACTS

A. The Interstate Commerce Commission Has Either Ignored or Failed to Comply With Two Successive Congressional Mandates Directing That All Unreasonable, Discriminatory Rates for the Transportation of Recyclable Materials Be Removed by Expedited Action. The Court of Appeals, in Response to Pleas Filed by Both the United States and the National Recycling Industry, Thus Remanded This Case to the Commission for Lawful Compliance With the Statutory Mandates

Twice since 1973 Congress has ordered the Interstate Commerce Commission *expeditiously* to rectify all railroad freight rates governing the transportation of recyclable solid waste materials which are either unjust, unreasonable or discriminatory.[1] The Commission effectively ignored the first statute enacted by Congress in 1973,[2] several months *after* this Court's June 18, 1973 decision in *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed. 2d 254.[3] Instead, the Commission proceeded to approve further rate increases for recyclables totaling 38% in the period of just two years after the 1973 statute became law, without taking any step to rectify alleged discrimination in the base rate structure.[4] The Commission thus increased transportation costs for the nation's recycling industry by roughly $100,000,000 per year without first attempting to eliminate any of the alleged discrimination in the base rate structure as ordered by Congress.[5]

On June 24, 1975, this Court rendered its so-called *S.C.R.A.P. II* decision under the National Environmental Policy Act (NEPA).[6] There, it was held that the ICC's belated, grudging compliance with NEPA in a general rate increase case involving all commodities was sufficient for that type of general rate increase proceeding; and that the ICC could leave to

---

[1] Section 603 of the Regional Rail Reorganization Act of 1973 (Pub. L. 93-236, Title VI, § 603, 1/2/74, 87 Stat. 1023; 45 U.S.C. 793); Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-219, Title II, § 204, 2/5/76, 90 Stat. 40; (45 U.S.C. 793 note).

[2] Section 603 of the 3R Act of 1973—enacted almost five years ago—provided:

> "*Freight Rates For Recyclables*
>
> "The Commission shall, by expedited proceedings, adopt appropriate rules under the Interstate Commerce Act which will eliminate discrimination against the shipment of recyclable materials in rate structures and in other Commission practices where such discrimination exists."

[3] In *S.C.R.A.P. I*, this Court ruled that alleged noncompliance by the ICC with the National Environmental Policy Act of 1969 (NEPA), in that the Commission did not prepare an Environmental Impact Statement to support a nationwide general freight rate increase on all commodities, including recyclables, did not give a three-judge district court authority to enjoin the ICC from "permitting" and the railroads from "collecting" that rate increase for the movement of recyclables which were allegedly unreasonable, unjust, or discriminatory.

Congress responded to this Court's decision in *S.C.R.A.P. I* by enacting Section 603 of the 3R Act of 1973, *supra*.

[4] The Commission approved seven (7) successive rate increases over a two-year span in *Ex Parte 295*, 344 ICC 589 (1974); *Ex Parte 303, Increased Freight Rates and Charges, 1974*, unpublished; *Ex Parte 305 R E, Nationwide Increase of Ten Percent In Freight Rates and Charges for Recyclables*, unpublished; *Ex Parte 313, Increased Freight Rates and Charges—Labor Costs*, unpublished; *Ex Parte 318, Increased Freight Rates and Charges, 1976*, unpublished; *Ex Parte 336, Increased Freight Rates and Charges, 1977*, unpublished.

[5] Indeed, since 1968, the pyramidic rate increases for shippers of recyclables total more than *70%, or approximately $200,000,000 in increased freight costs per year added on top of a base rate structure which is allegedly grossly unreasonable and discriminatory* (see Pet. App. 11b, 24b).

[6] *Aberdeen & Rockfish R. Co.* v. *S.C.R.A.P.*, 422 U.S. 289, 95 S.Ct. 2336, 45 L.Ed. 2d 191.

more appropriate future proceedings the task of deciding whether the base rate structure for recyclable materials, as affected by pyramidic general rate increases, was unjust, unreasonable or discriminatory.

The Commission's complete failure to comply with the 1973 Act, coupled with the gravaman of this Court's decision in *S.C.R.A.P. II, supra,* caused Congress to enact a far more specific, demanding statute—Section 204 of the so-called 4R Act of 1976 entitled "Investigation of Freight Rates for Transportation of Recyclable or Recycled Materials."[7]

---

[7] As here pertinent, Section 204 of the 1976 Act reads as follows (45 U.S.C. 793 note):

"(a) *Investigation—The Commission, within 12 months after the date of enactment of this Act [Feb. 5, 1976]*, and thereafter as appropriate, shall—

"(1) conduct an investigation of (A) the rate structure for the transportation by common carriers by railroad subject to part I of the Interstate Commerce Act of recyclable or recycled materials and competing virgin natural resource materials, and (B) the manner in which such rate structure has been affected by successive general rate increases approved by the Commission for such common carriers by railroad;

"(2) determine, after a public hearing during which the burden of proof shall be upon such common carriers by railroad to show that such rate structure, as affected by rate increases applicable to the transportation of such competing materials, is just, reasonable, and non-discriminatory, whether such rate structure is, in whole or in part, unjustly discriminatory or unreasonable;

"(3) *issue in all cases in which such transportation rate structure is determined to be, in whole or in part, unjustly discriminatory or unreasonable, orders requiring the removal from such rate structure or such unreasonableness or unjust discrimination;* and

"(4) report to the President and the Congress in the annual report of the Commission for each of the 3 years following the date of enactment of this Act [Feb. 5, 1976], and in such other reports as may be appropriate, all actions commenced or completed under this section to eliminate unreasonable or unjustly discriminatory rates for the transportation of recyclable or recycled materials.

"(b) *Participation*—The Administrator of the Environmental Protection Agency shall take such steps as are necessary to assure that *the Commission carries out the requirements set forth in subsection (a) as expeditiously as possible.* [Italics supplied.]

In response to Section 204 of the 1976 law, the Commission commenced *Ex Parte 319—Investigation of Freight Rates and Charges for the Transportation of Recyclable and Recycled Materials,* and the burden of proof was ostensibly placed on the railroads.[8] However, the evidence thereafter submitted by the railroads was repeatedly criticized by federal agencies participating in the investigation, and in their final decision, even the ICC's 5-member majority strongly rebuked the quality of the railroads' testimony and exhibits.[9] Nevertheless, the sworn evidence the railroads did submit established beyond peradventure that—

(a) rates for movement of recyclable materials are uniformly inexplicably higher than those charged for transportation of their virgin resource counterparts; and

(b) rates for recyclables are, in most cases, inexplicably and unjustly at the very top of the national railroad freight rate spectrum, meaning that shippers of recyclable materials are actually *subsidizing* most other shippers, including shippers of virgin natural resources, who are favored with lower rates.[10]

---

[8] See Pet. App. 17b, 52d.

[9] See Pet. App. 18b.

[10] See Pet. App. 18b, 19b.

However, by a sharply divided 5 to 3 vote, the Commission arbitrarily and erroneously failed to take any significant actions to comply with the clear-cut Congressional mandate found in Section 204 of the 4R Act of 1976—*that is, it failed to order the removal by February 5, 1977 of rates for recyclables which the railroads' own evidence proved to be prima facie unjust, unreasonable or discriminatory.* The Commission's stubborn, capricious failure to comply with the aforesaid Congressional mandate brought forth vigorous dissents from the current Chairman and two Vice Chairmen of the Commission, who stated: [11]

> "[W]e do not believe that the majority has complied with section 204 of the 4R Act by issuing its report . . . .
>
> "This agency has been promising, and under section 204 was required, to resolve the longstanding question of whether the underlying rate structures for virgin materials and competing recyclable materials are unreasonable or discriminatory. The Supreme Court in *Aberdeen & Rockfish R. Co.* v. *S.C.R.A.P.*, 422 U.S. 289, 322-328 (1975) recognized our discretion to select an appropriate proceeding to examine the issue. This was supposed to be that proceeding. [We are] sorry to state that we have failed to resolve the issue by neglecting to abide by the rules provided by the Congress."

Respondents NARI et al., immediately filed a petition for review in the Court of Appeals. The Department of Justice, representing the United States, filed a brief in the Court of Appeals, contending the Commission had totally failed to comply with Section 204 of the 4R Act of 1976. On August 2, 1978, *after expedited proceedings,* the Court of Appeals *unanimously* voted to remand the case to the ICC, holding "the Commission's order does not represent a reasoned compliance with the mandate of Section 204." [12]

[11] See Pet. App. 322, 323d.

On October 16, 1978, the Court of Appeals modified its order and found that, in light of the *Congressional mandate* for *"expedited action"* found in *both* Section 603 of the 3R Act of 1973 and Section 204 of the 4R Act of 1976, the proceedings on remand should be *expedited* and completed within six months.[13]

Mr. Chief Justice Burger thereupon denied the railroads' motion for a stay of the Court of Appeals' orders.

The Interstate Commerce Commission has *not* filed a petition for certiorari. Rather, it is proceeding expeditiously with the proceedings on remand, so the railroads alone sought this Court's review of the Court of Appeals' orders in the proceedings below.

B. Congress Twice Demanded That the Commission, by Expedited Action, Remove All Freight Rates for Recyclables Which Are Unjust, Unreasonable or Discriminatory Because Overriding, Crucially Important National Objectives Require Prompt Removal of All Economic Roadblocks to Maximum Industrial Utilization of Recyclable Materials in the United States

In their petition for certiorari, the railroads once again seek to divert judicial attention from the simple, clear-cut statutory directives contained in Section 603 of the 3R Act of 1973 and Section 204 of the 4R Act of 1976—and from the overriding, crucially important, urgent national objectives which caused Congress to

[12] See Pet. App. 3b.

[13] See Pet. App. 2c.

include those statutory mandates for expeditious removal of unreasonable, discriminatory freight rates for recyclable solid waste materials in legislation otherwise designed for the rehabilitation and relief of the railroad industry—by urging this Court myopically to concentrate on the "financial plight of many of the nation's railroads" and on the fact that some railroads (largely because of their own monumental mismanagement) became bankrupt several years ago. The legislative record supporting these two statutes makes it abundantly clear, however, that Congress itself was fully aware of the adverse financial condition of certain segments of the railroad industry when it enacted Section 603 of the 1973 Act and Section 204 of the 1976 Act, but plainly it decided it could not allow that factor to deter or interfere with the prompt removal of all unsupportable, unlawful freight rate barriers to maximum industrial recycling in the United States.[14]

---

[14] Section 101 of the Regional Rail Reorganization Act of 1973, for example, states (45 U.S.C. 702(a)):

> "The Congress finds and declares that—(1) Essential rail service in the midwest and northeast region of the United States is provided by railroads which are today *insolvent and attempting to undergo reorganization under the Bankruptcy Act.*"

Nevertheless, Section 603 of that same 3R Act of 1973 (45 U.S.C. 793) directs the ICC "by expedited proceedings" to eliminate rate discrimination against the shipment of recyclable materials.

Similarly, the Senate Commerce Committee Report in support of the 4R Act of 1976 states that *"Eight major carriers in the Northeast and Midwest are bankrupt; several elsewhere in the country are in precarious financial condition and one in bankrupt"* (see S. Rep. No. 94-499, 94th Cong. 2d Sess., pg. 4 (U.S. Code Cong. & Adm. News, 1976, Vol. I).

Again, however, at Section 204 of the same 4R Act of 1976, Congress ordered the ICC to eliminate all freight rates and rate increases for recyclables which are unreasonable or discriminatory, and it placed the statutory burden of proof on the railroads.

For several years, leading federal, state, municipal and private agencies constantly petitioned Congress to repeal and rectify all federal laws, policies and programs which have operated to stifle and prevent maximum industrial use of recyclable solid waste materials in the United States. Extensive scientific evidence was presented to Congress which demonstrated that maximum industrial utilization of recyclable materials in place of their respective virgin natural resource material counterparts will result in—

(i) major energy savings for the United States;[15]

(ii) important conservation of scarce, depletable natural resources;[16]

(iii) significant reduction of industrial air and water pollution, and water utilization;[17]

---

[15] See *"Energy In Solid Waste,"* Citizens Advisory Committee On Environmental Quality (1976); Report To Congress On Resource Recovery, 1973, Environmental Protection Agency; Atomic Energy Commission Report No. ORNL-NSF-EP-24, Oak Ridge National Laboratory; *"Exploring Energy Choices,"* The Ford Foundation's Energy Policy Project, 1974. *Today, as much as 60% to 95% energy conservation is attained by aluminum, copper, iron and steel, paper and rubber producers who use recyclable raw materials instead of virgin ores, pulp wood or rubber in their production processes.*

[16] See H. Rept. 94-1461, 94th Cong. 2d Sess., pgs. 4, 5; H. Rept. 94-1491, 94th Cong. 2d Sess., pg. 3; Final Report To Congress, National Commission On Materials Policy, June, 1973, pg. 4D-1, et seq.; Report To Congress On Resource Recovery, 1973, Environmental Protection Agency, § 2, pg. 7.

[17] Report To Congress On Resource Recovery, EPA, 1973, § 2, pg. 8, Tables 2-5.

(iv) reduced U.S. dependence on foreign nations, usually foreign cartels, for critically important natural resources and energy;[18]

(v) alleviation of bulging deficits in U.S. balance of payments resulting from increased reliance on foreign natural resources and energy;[19] and

(vi) relief to State and local governments in their constant struggle against the "solid waste disposal crisis" and rising solid waste disposal costs.[20]

Over the years since 1965, Congress responded by enacting a series of laws aimed at attaining maximum industrial recycling levels in the United States and at eliminating all short-sighted, federally-sponsored eco-

---

[18] Presently, in *nonferrous metals*, the United States imports 100% of its chromium requirements; over 90% of its aluminum; 80% of its tin; 70% of its nickel and 50% of its zinc—and our rate of consumption continues to increase (H. Rept. 94-1461, *supra*, tt pgs. 90, 91. By the year 2000, the U.S. will be depending on foreign supplies for more than 50% of its needs of all 13 basic metals.

[19] Final Report To Congress, National Commission on Materials Policy, Ch. 9, pgs. 9-21; Ch. 4D.

[20] "*Cities And The Nation's Disposal Crisis,*" National League of Cities—U.S. Conference of Mayors, 1973, at pg. 1, where it states: "The disposal of wastes and the conservation of resources are two of the greatest problems to be understood and solved by this nation in the latter third of the century"; also, "*The States' Role In Solid Waste Management,*" Council of State Governments, 1973. In *City of Philadelphia* v. *New Jersey*, 98 S. Ct. 2531 (6/23/78)), this Court found it necessary to declare unconstitutional a New Jersey statute that prohibited Philadelphia from dumping its solid waste in New Jersey landfills. The Court reminded New Jersey of the growing seriousness of the solid waste disposal problem, and warned that tomorrow it may find it necessary to seek interstate dumping sites for its growing volumes of solid waste in Pennsylvania or in New York (98 S.Ct. 2540).

nomic roadblocks to maximum recycling. In 1965, Congress passed the Solid Waste Disposal Act (42 U.S.C. 3251 et seq.). It directed the Environmental Protection Agency to investigate the effects of existing federal programs and policies on industrial recycling and to recommend what might be done to eliminate all federally-sponsored disincentives to the reuse, recycling and conservation of materials (42 U.S.C. 3253 a(5), (6)).

In 1970, Congress passed two additional statutes—the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321, et seq.) and the National Materials Policy Act (Pub. L. 91-512, §§ 201-206, 91st Cong. 2d Sess.). The former (NEPA) directed *all* agencies of the Federal Government "to use all practicable means . . . to enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources" (42 U.S.C. 4331). The second statute created the National Materials Policy Commission, and directed it to develop a *"national policy"* that would increase the "reuse of materials that are susceptible to recycling . . . in order to enhance environmental quality and conserve materials."

In response to these three statutes, the Environmental Protection Agency, the National Materials Policy Commission, the Citizens Advisory Committee on Environmental Quality, the National League of Cities, the U.S. Conference of Mayors, the Council of State Governments and others all rendered reports to Congress complaining that *unreasonable, discriminatory freight rates for the transportation of recyclable materials administered by the Interstate Commerce Commission*

were restricting, preventing and impeding maximum industrial recycling in the United States.[21]

At or about the time this Court rendered its decision in *United States* v. *S.C.R.A.P. (S.C.R.A.P. I), supra,* on June 18, 1973, the National Commission on Materials Policy reported to Congress, at page 4D-17 of its final report:

> "Rail freight rates are an important factor in the economics of recycling. Transportation costs are a large percentage of the total cost of using some secondary materials. Often they determine whether recycling can be profitable. Certain railroad freight rates appear to discriminate against secondary materials in favor of virgin materials . . . .
>
> "As transportation costs increase with distance, the rates determine not only whether the scrap moves, but also how far. In effect, transportation costs isolate many forms of scrap from various buyers . . . .
>
> "Wastepaper and textile scrap sometimes cost processors less to acquire than to ship.
>
> "The higher the cost of transportation in relation to final selling price, the less the processor can spend to upgrade scrap. Then only high quality scrap moves; the rest is solid waste."

[21] Report To Congress On Resource Recovery, Environmental Protection Agency, 1973; Final Report To Congress, National Commission On Materials Policy, 1973, pg. 4D-17; *"States' Role in Solid Waste Management."* Council Of State Governments, 1973, pg. 43; *"Cities And The Nation's Disposal Crisis,"* National League of Cities—U.S. Conference of Mayors, 1973, pgs. 9-15; *"Energy In Solid Waste,"* Citizens Advisory Committee On Environmental Quality, p. 25.

The National Materials Policy Commission thus made the following recommendation to the President and Congress, at page 4D-18:

> "We recommend that the Federal Government take the necessary steps to correct the existing freight rate differentials between secondary and primary materials."

Thus, as a result of this Court's June, 1973 decision in *S.C.R.A.P. I, supra,* and the numerous official reports and recommendations received as aforesaid, Congress enacted Section 603 of the Regional Rail Reorganization Act in December, 1973 (45 U.S.C. 793) which provides:

> *"Freight Rates for Recyclables*
>
> "The Commission shall, *by expedited proceedings,* adopt appropriate rules under the Interstate Commerce Act which will eliminate discrimination against the shipment of recyclable materials in rate structures and in other Commission practices where such discrimination exists."

As stated above, the Commission largely ignored the simple, direct Congressional mandate contained in Section 603 of the 1973 Act.[22] It took no action whatsoever to eliminate, reduce or modify any rate charged for the movement of recyclable materials. On the contrary, the Commission seriously exacerbated the existing discrimination by approving, during the short

[22] The Commission simply re-codified the long-standing rules and regulations with reference to rate discrimination which had enabled the serious discrimination against recyclables to thrive (see *Ex Parte 306,* Pub. L. 93-236, *Freight Rates for Recyclables,* 346 ICC 408).

period from 1974 to 1976, seven successive new, cumulative rate increases for recyclable materials.[23]

This outrageous performance by the Commission, coupled with this Court's 1975 decision in *S.C.R.A.P. II, supra,* led to the clear, unambiguous statutory mandate to the Commission found in Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 793 note). Congress ordered the Commission in plain, unmistakable terms forthwith to investigate the rate structure for recyclable materials and the manner in which that structure has been affected by successive rate increases approved by the Commission, *and the Commission was unqualifiedly directed to rectify all portions of the rate structure that are unjust, unreasonable or discriminatory within one year from February 5, 1976, the date of enactment of the Railroad Revitalization and Regulatory Reform Act* (see 45 U.S.C. 793 note).

It is hardly surprising that Congress included this high priority recycling freight rate mandate to the Commission in the 4R Act of 1976, which, like the 3R Act of 1973, was designed mainly as rehabilitation legislation for the railroads. The Act itself, of course, was drafted to deal *also* with *"regulatory reform,"* principally in the area of ratemaking.[24] Congress thus decided this was an appropriate place to insert its *second demand* that the ICC *"reform"* freight rates for recyclables. Moreover, in both the 3R Act of 1973 and the 4R Act of 1976, Congress committed vast

[23] See footnotes 4, 5 *supra.*

[24] See 4R Act of 1976, § 101(a), 45 U.S.C. 801; Title II, entitled "Railroad Rates," wherein Congress inserted § 204 entitled *"Investigation of Discriminatory Freight Rates for the Transportation of Recyclable Materials."*

amounts of Federal funds to the rehabilitation of the railroad industry. Considering the huge, overriding national interests involved in maximizing industrial recycling in the United States, Congress thus included *"rate reform for recyclables"* in both Acts as a *quid pro quo* for its commitment of so much Federal money and credit to the railroads.

Finally, when Congress enacted the 4R Act of 1976, it was simultaneously gravely concerned with *energy conservation* and *resource conservation and recovery.* Later that year, it enacted the Resource Conservation and Recovery Act of 1976 (Pub. L. 94-580, 90 Stat. 2796, 42 U.S.C. 6901, et seq.), and just this year it finally enacted the National Energy Conservation Policy Act of 1978 (Pub. L. 95-619, § 461). The 1976 Act contains the following Congressional findings (42 U.S.C. 6901(c), (d)):

> "(c) *Materials*
>
> "The Congress finds with respect to materials that—
>
> "(1) millions of tons of recoverable material which could be used are needlessly buried each year;
>
> "(2) methods are available to separate usable materials from solid waste; and
>
> "(3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in the balance of payments.
>
> "(d) *Energy*
>
> "The Congress finds with respect to energy that—
>
> "(1) solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy . . . ."

Congress thus directed the Secretary of Commerce to *"stimulate development of markets for recovered materials"* and to *remove "economic barriers to the use of recovered materials"* (42 U.S.C. 6951, 6953). In the National Energy Conservation Policy Act, it defined recyclable materials as *"energy property,"* and directed the Secretary of Energy to establish annual "industrial recycling targets" in the energy-intensive metals, paper, textile and rubber industries which will enable the United States to attain *maximum national recycling levels by 1987.*[25]

Plainly therefore, the Congressional mandates found in Section 603 of the 3R Act of 1973 and Section 204 of the 4R Act of 1976 are part and parcel of a broad pattern of modern, urgent Congressional enactments aimed at obtaining critically important, maximum industrial use of recyclable materials in the United States at the earliest possible date. So far, the railroads and a majority of the ICC have failed to grasp the significance or need for this intense Congressional concern and they have thus obdurately refused to comply with the statutory directives Congress has twice provided in recent years, albeit as next demonstrated, the railroads themselves have proved that their rate structures for recyclable materials are unlawful, unjust, unreasonable and discriminatory under even time-tested measuring rods prescribed by the Commission itself to judge such matters.

---

[25] See National Energy Tax Act of 1978, § ——; and National Energy Conservation Policy Act, P.L. 95-619, § 461.

C. The Railroads Completely Failed to Carry Their Statutory Burden of Proof Under Section 204 of the 4R Act of 1976 in *Ex Parte 319*. Indeed, Their Own Sworn Evidence Established That Freight Rates for Recyclables Throughout the United States Are Grossly Unreasonable and Discriminatory

Section 204(a)(2) of the Railroad Revitalization and Regulatory Reform Act placed the burden of proof on the railroads to show that their rate structures for recyclable materials are just, reasonable and nondiscriminatory. The railroads totally failed to carry that statutory burden of proof. Instead, the sworn evidence they themselves presented in Ex Parte 319 actually established beyond doubt that their rate structures for recyclable nonferrous metals, wastepaper, textiles and rubber throughout the United States are extraordinarily unreasonable and discriminatory, even when subjected to the old tests the Commission has historically applied under the Interstate Commerce Act to adjudge such issues.

When the Commission commenced *Ex Parte 319* on February 25, 1976, it advised the parties from the very outset that its determination of rate reasonableness and discrimination would be *"primarily based on comparisons of [railroads] cost-revenue relationships"* (Pet. App. 6d). The railroads were required to select "representative or repetitive movements" for each set of virgin and recyclable counterpart materials, and to present (a) the revenues received by the railroads for such movements, and (b) the "variable costs" incurred by the railroads to perform such movements, and finally (c) the resulting revenue/variable cost ratios for those movements (Pet. App. 7d, et seq.).

The evidence thereafter presented before the Commission established that the *national average* Revenue/

Variable Cost Ratio for all traffic moving by rail in the United States is *131.8%*—that is, *nationally, the railroads' average revenues exceed their variable costs for providing rail freight transportation by 31.8%.*[26] The evidence also showed that recently the Commission itself established nationally a Revenue/Variable Cost Ratio of *160%* as presumptive proof that railroads exercise *"market dominance"* over transportation of commodities within the meaning of Section 202(c) of the 4R Act of 1976 (49 U.S.C. 15).[27] *In other words, when a railroad collects revenues 60% or more in excess of its variable costs for providing transportation, a presumption arises that it enjoys "market dominance" or "monopoly control" over that traffic.*

In *Ex Parte 319,* however, the railroads' own sworn evidence shows that recyclable materials, designated by Congress as vitally important *"energy property",* are being forced throughout the United States to pay rates that produce the following shocking, extremely excessive, grossly unreasonable Revenue/Variable Cost Ratios for the railroads:[28]

[26] ICC *"Burden Study"* for All Traffic Moving By Rail, 1975.

[27] See *Ex Parte 320—Special Procedures For Making Findings Of Market Dominance Under The Railroad Revitalization And Regulatory Reform Act,* —— ICC —— (1976); *Atchison, Topeka & Santa Fe Railway Co.* v. *Interstate Commerce Commission,* CCA, D.C., Nos. 76-2048, 2070, 5/2/78, —— F.2d ——.

[28] Pet. App. D; J.A. I, pgs. 181, 239, 285, 288, 326, 337, 383.

Recyclable Commodities	*East*	*South*	*West*
Aluminum Residues	431%	227%	213%
Aluminum Scrap	177	184	161
Miscellaneous Nonferrous Metals	319	—	227
Copper Matte	204	—	281
Copper Scrap	191	211	226
Lead Matte	156	—	171
Lead and Zinc Scrap	186	226	155
Zinc Dross	179	214	151
Wastepaper	124	138	150
Textile Waste	125	109	144
Reclaimed Rubber	—	228	241
Rubber Waste	128	164	164

On October 5, 1977, seven months after it rendered its decision in *Ex Parte 319,* the Interstate Commerce Commission filed a report with Congress entitled "The Impact of the 4R Act Railroad Ratemaking Provisions" in which it reported that—

(i) rates which result in Revenue/Variable Cost Ratios of *180%* or more are in the top *6.5%* of the entire national rate spectrum;

(ii) rates which result in Revenue/Variable Cost Ratios of *170%* or more are in the top *8.6%* of the entire national rate spectrum; and

(iii) rates which result in Revenue/Variable Cost Ratios of *150%* or higher are in the top *14.9%* of the entire national rate spectrum.

Then, just recently, the Commission ruled in *Ex Parte 343—Increased Freight Rates and Charges, 1977,* ——ICC —— (1978), that *commodities subject to rates which produce Revenue/Variable Cost Ratios of 180% or higher should either be exempted from or favored by holddowns in national general rate increase proceedings.*

But, in *Ex Parte 319,* with a few relatively meaningless exceptions, the Commission, by a sharply divided 5 to 3 vote, arbitrarily refused to rectify the aforementioned patently unreasonable rates for recyclables under Section 204 of the 4R Act, capriciously contending that the railroads allegedly need the extra revenues; and that recyclable materials seemingly are not sensitive to high freight rates, and thus they can be made to bear both exceedingly high base rates and constant increases in those rates (Pet. App. D).

The railroads' sworn evidence before the Commission in *Ex Parte 319* also proved, however, that rates for recyclable materials are *grossly discriminatory* when compared with rates for their virgin resource counterparts. For example, the Eastern Railroads proved that their rates for virgin pulpwood and wood chips, on the one hand, and recyclable wastepaper, on the other, produce the following Revenue/Variable Cost Ratios in the Eastern Territory:[29]

Pulpwood	—	67%
Wood Chips	—	61%
Wastepaper	—	124%

Thus, on the average, the *virgin, primary paper-making raw materials of the paper industry* are carried in the East at rates which are *extremely noncompensatory* for the railroads (33% to 39% *below cost*), while *the recyclable, secondary paper-making raw material of the paper-making industry (wastepaper)* is forced to bear rates *24% in excess* of costs.

Similar evidence was presented by the railroads for virgin *alumina-aluminum scrap and residues.* In the

[29] See Pet. App. 261d, Table 80c.

East, the virgin commodity's Revenue/Cost Ratio was proved to be *132%,* while the recyclable commodities' ratios are *187%* and *285%* (Pet. App. 125d). In the South, the virgin commodity's ratio is *178%,* while the recyclables' rate ratios are *190%* and *223%* (Pet. App. 125d). In the West, the same rate inequity exists with virgin commodity and recyclable ratios of *184%* vs. *187%-232%* (Pet. App. 125d).

The same type of serious, inexplicable rate discrimination was established by the Eastern, Southern and Western Railroads' evidence regarding *virgin copper-recyclable copper; virgin lead and zinc-recyclable lead and zinc; virgin rubber-recyclable rubber, etc.* (Pet. App. D).

Finally, ratemaking insult was added to injury when the railroads' evidence also established that, on balance, the *transportation characteristics of the recyclable materials* are almost uniformly *superior* and *more beneficial* to the railroads than the *transportation characteristics of virgin natural resource counterparts.* Generally, recyclable aluminum, copper, lead, zinc, wastepaper, textiles and rubber are shipped in *General Purpose Boxcars,* loaded by shippers and unloaded by their consignees, while most of the virgin ore, timber, etc., require expensive *special railroad cars,* expensive loading at isolated mining-forest locations, and expensive *empty returns* for the railroads from mill locations to mines or forests (Pet. App. D).

In sum and substance, therefore, the evidence produced by the railroads themselves in *Ex Parte 319* proves that—

(1) shippers of recyclable materials are being forced to subsidize the railroads' movement

of competing, depletable virgin natural resource materials, and

(2) shippers of recyclable materials are being forced to subsidize the railroads' transportation of the vast majority of other freight traffic in the United States since, in most cases, the rates they pay are at the very top of the entire rate spectrum.

Nevertheless, again with minor, negligible exceptions, the Commission failed and refused to adjust any of these rates for recyclables in *Ex Parte 319,* albeit obviously the railroads completely failed to carry their statutory burden of proof under Section 204 of the 1976 statute. This resulted in stinging dissents filed by the present Chairman and Vice Chairman (Commissioners O'Neal and Christian), and by the then Vice Chairman (Commissioner Clapp) (Pet. App. 322d, 323d). Vice Chairman Clapp stated (Pet. App. 323d):

> "The majority, in approving this report, has failed to meet the Commission's responsibility under section 204 of the 4R Act. In essence, Congress instructed the Commission to investigate the rate structure for 'recyclable or recycled materials and competing natural resource materials, and the manner in which such rate structure has been affected by successive general rate increases.' The Commission has responded in this report by saying the commodities do not compete. This misses the mark and by a wide margin.
>
> "The record clearly demonstrates that rate disparities exist with regard to some of the recyclble commodities and their counterparts . . . .
>
> "The concept of competition applied here is unrealistically narrow . . . .
>
> "In my view, . . . the term *'discrimination'* as used here means unequal treatment and that unequal treatment has been shown. The Commission should now face the hard task of determining whether that inequality is justified by differing transportation conditions."

Commissioners O'Neal and Christian were equally vehement, stating (Pet. App. 322d, 323d):

> "[W]e do not believe that the majority has complied with Section 204 of the 4R Act by issuing its report. Section 204(a)(2) requires the Commission to conduct an investigation of the rate strucstructures of recyclable materials and competing virgin natural resource materials, in which the carriers bear the burden of proving that the rate structures are reasonable and nondiscriminatory. To [us], that means that the entire burden of justifying the existing rate structures was placed on the railroads, who were obligated to demonstrate that such structures are reasonable and do not result in discrimination against recyclables. But under the majority's approach, this has not been done. The report dwells more on industry structures than rate structures and has unlawfully shifted the burden of proof to the ratepayers.
>
> "The report never comes to grips with the concept of discrimination . . . .
>
> ". . . . The only inquiry appears to be 'what the traffic will bear.' There is no real analysis of rate structures. Nor is there any thorough analysis of the effect of the general increases upon those rate structures, as required by section 204."

SUMMARY OF ARGUMENT

I

Under the Administrative Procedure Act (5 U.S.C. 706), it is clear that, when both the United States and the national recycling industry challenged the Interstate Commerce Commission's actions in *Ex*

Parte 319 as unlawful and in violation of specific mandates of Congress contained in Section 603 of the 3R Act of 1973 and Section 204 of the 4R Act of 1976, the Court of Appeals was empowered (i) to decide all relevant questions of law; (ii) to interpret the two statutes; (iii) to compel agency action unlawfully withheld or unreasonably delayed; (iv) to hold unlawful and set aside the Commission's 5 to 3 majority opinion in *Ex Parte 319* if it was not in accordance with law; and in such case (v) to remand the case to the Commission with directions that it expeditiously comply with the applicable Congressional mandates.

The Court of Appeals plainly had the same power, under applicable decisions of this Court, to determine whether the course followed by the Commission in *Ex Parte 319* was "consistent with the mandates of Congress," and to remand those decisions to the Commission if they were not (*Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 806; *Burlington Truck Lines, Inc.* v. *United States,* 317 U.S. 156, 167-169).

Moreover, in this case, Congress in Section 204(d) of the 4R Act of 1976 itself specifically clothed the Court of Appeals with full authority to review the Commission's actions under Sections 204(a)(c). Here, Congress wanted to be certain that, if the Commission once again failed to comply with the prescribed statutory mandates, its actions would be subject to specific, effective judicial review.

On the basis of that array of authority and the record persented in this case, the Court of Appeals patently acted properly in setting aside the Commission's majority decision and by remanding the case to the Commission for lawful compliance with the applicable Congressional mandates.

II

This Court's 1973 and 1975 decisions under the National Environmental Policy Act (NEPA) in S.C.R.A.P. I and S.C.R.A.P. II are essentially irrelevant to the Court of Appeals' decision in this case under Section 204 of the 4R Act of 1976. The Court of Appeals issued *no* injunctive relief here, and its orders were not rendered in a nationwide general rate increase proceding under Section 15(7) of the Interstate Commerce Act, but under Section 204 of the 4R Act of 1976 in a case involving the legality of the base rate structure for recyclable materials only. Moreover, its remand order to the Commission is wholly in line with this Court's decision in *Wichita Board of Trade, supra,* a decision this Court rendered in 1973 on the same day as its decision in *S.C.R.A.P. I.*

Section 204 of the 4R Act of 1976 was enacted by Congress shortly after this Court's 1975 decision in *S.C.R.A.P. II* and in response to this Court's holding that the legality of the base rate structures for recyclable materials must be litigated before the Commission in a special proceeding, separate and apart from nationwide general rate increase proceedings. Thus, Congress mandated such a special proceeding; the Commission failed to comply with the Congressional mandates contained in that statute, so the Court of Appeals appropriately remanded the case to the Commission for expeditious compliance with those statutory mandates.

In no sense, therefore, do the Court of Appeals' orders in this case raise the same issues as those resolved by this Court in *S.C.R.A.P. I* and *S.C.R.A.P. II,* as contended by the railroads.

III

The Court of Appeals plainly did not usurp the Commission's substantive authority and it did not simply reweigh the evidence or substitute its judgment for that of an expert agency. Rather, it properly interpreted the relevant statutory provisions, and decided all relevant questions of law. Like three of the eight ICC Commissioners themselves, it then concluded that the Commission's majority decision did not represent reasoned compliance with the mandate expressed by Congress in Section 204 of the 4R Act of 1976.

The evidence the railroads themselves submitted in *Ex Parte 319* established a *prima facie* case of gross *rate unreasonableness* and *rate discrimination.* The railroads, which have the statutory burden of proving that their rates for recyclables are just, reasonable and nondiscriminatory, then completely failed to carry that burden in *Ex Parte 319.* The Commission nevertheless refused to adjust the rates, holding *inter alia* the railroads allegedly need the revenues, recyclable materials allegedly have poor "transportation demand elasticity," and the competitive relationship between recyclable materials and their virgin counterparts is not always absolutely perfect in all respects.

The Court of Appeals correctly ruled that, *as a matter of law under Section 204,* these are not acceptable "excuses" for unreasonable, discriminatory rate structures. Its holding is wholly in line with this Court's decisions in *State of New York* v. *United States,* 331 U.S. 284 (1947) and *Interstate Commerce Commission* v. *N.Y., N.H. & Hartford R. Co.,* 372 U.S. 744, 753, 758 (1963).

In fact, under the Interstate Commerce Act itself, all unreasonable, discriminatory rates are unlawful

and prohibited, and they cannot be countenanced on the basis of claims that the railroads need the unlawful revenues; or that recyclable materials, subject to such rates, can bear the illegal charges and still move. (See 49 U.S.C. §§ 1(5), 3(1) and 13).

Ergo, the Court of Appeals properly corrected the Commission's errors of law and remanded the case to the Commission—and by so doing it did not invade any "reasoned exercise of expertise" by the ICC within the meaning of this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U.S. 519, 558 (1978).

IV

Similarly, the Court of Appeals did not usurp the Commission's procedural authority by requiring, *in line with two successive Congressional mandates for expedited action,* that the proceedings on remand be completed within six months. Section 204 of the 4R Act actually directed that all unjust, unreasonable, discriminatory rates be eliminated *by a fixed date—February 5, 1977.* That date passed two years ago, and still the Congressional mandate remains unfulfilled.

In the meantime, shippers of recyclable materials throughout the nation are being forced to suffer tremendous, irreparable injury and damage, and delays in this case are operating to create serious, irreparable damage to the Congressional mandates for expedited maximized industrial recycling and resource-energy conservation in the United States. Moreover, continuation of unreasonable, discriminatory freight rate barriers to maximized industrial recycling are forcing cities and states throughout the nation to suffer huge, irreparable solid waste disposal losses in both dollars

and depletion of available landfill space for unrecycled solid waste materials (see *City of Philadelphia* v. *New Jersey*, 98 S. Ct. 2531 (1978)).

Confronted with these facts—especially the specific Congressional mandate that all freight rates for recyclables be rectified by February 5, 1977, two years ago—the Court of Appeals sought to give belated force and effect to this Congressional directive by ordering the Commission expeditiously to complete proceedings on remand within six months from October 16, 1978.

That requirement is wholly consistent with other similar six- to nine-month time limits imposed on the Commission for like proceedings under both the Interstate Commerce Act and the 4R Act of 1976—and it is similar to the type of expedited remand order issued by this Court in *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 334, 335 (1976).

ARGUMENT

I

Under the Administrative Procedure Act, Section 204(d) of the 4R Act of 1976 and Relevant Decisions of This Court, the Court of Appeals Had Full Authority in This Case to Interpret Section 603 of the 3R Act of 1973 and Section 204 of the 4R Act of 1976, to Decide All Pertinent Questions of Law, to Set Aside the Commission's Actions in *Ex Parte 319* That Were Not in Accordance With Law, and to Remand This Case to the Commission for Further Proceedings That Are in Compliance With the Statutory Mandates of Congress

Under the Administrative Procedure Act (5 U.S.C. 706), it is absolutely clear that when both the United States and the national recycling industry challenged

the Interstate Commerce Commission's actions in *Ex Parte 319, supra,* as unlawful and in violation of specific mandates of Congress contained in Section 603 of the 3R Act of 1973 and Section 204 of the 4R Act of 1976, the Court of Appeals was empowered—

(i) to decide all relevant questions of law;

(ii) to interpret Section 603 of the 1973 Act and Section 204 of the 1976 Act;

(iii) to compel agency action unlawfully withheld or unreasonably delayed;

(iv) to hold unlawful and set aside the Commission's 5 to 3 majority opinion in *Ex Parte 319* if it was found not to be in accordance with law; and in such case,

(v) to remand the case to the Commission with directions that it expeditiously comply with the applicable statutory mandates of Congress.

Historically, of course, this Court has ruled that it is the *duty* of a reviewing court to determine whether the course followed by the Interstate Commerce Commission in administrative proceedings before that agency is *consistent with the mandate from Congress* (*Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 806, 93 S.Ct. 2367, 2374, 37 L. Ed. 2d 350 (1973); *Burlington Truck Lines, Inc.* v. *United States,* 317 U.S. 156, 167-169, 83 S.Ct. 239, 245-246, 9 L.Ed. 2d 207 (1962)). In *Burlington Truck Lines, Inc., supra,* Mr. Justice White writing for this Court ruled, at 371 U.S. 156, 167, that federal courts have this vitally important *duty* under the Administrative Procedure Act because, in most cases, it is perfectly clear that "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory

body" (see also, *Federal Communications Commission* v. *RCA Communications,* 346 U.S. 86, 90, 73 S.Ct. 998, 1002 (1953)).

In this case, Congress clearly did not purport to transfer any legislative power to the unbounded discretion of the regulatory body. On the contrary, it enacted Section 204 of the 4R Act of 1976 for the sole purpose of directing the Interstate Commerce Commission to perform specific administrative functions assigned to it by Congress—*basically, the removal of all freight rates for recyclable materials the railroads could not prove to be just, reasonable and nondiscriminatory*—and in order to be certain that task was properly and lawfully performed by the recalcitrant Commission which had failed to comply with a similar Congressional mandate found in Section 603 of the 3R Act of 1973, Congress specifically provided in Section 204(d) of the 4R Act of 1976—

> "*Review*—Orders issued by the Commission pursuant to this section shall be subject to judicial review or enforcement in the same manner as other orders issued by the Commission under the Interstate Commerce Act."

Ergo, in this case, the Court of Appeals not only had the authority to review the *lawfulness* of the Commission's order in *Ex Parte 319* under the Administrative Procedure Act—*it had the further, specific power of full judicial review under Section 204(d) of the 4R Act of 1976 itself.* Here, Congress wanted to be certain that if the Commission once again failed to comply with prescribed statutory mandates, its actions would immediately be subject to specific, effective judicial review.

Moreover, while the railroads' petition for certiorari repeatedly suggests that federal courts reviewing agency actions under the Administrative Procedure Act must defer to "*the expert appraisal of the agency,*" this case came before the Court of Appeals with a record which showed that—

(i) the current Chairman and Vice Chairman, as well as the former Vice Chairman of the Commission, all vigorously dissented from the 5-member majority opinion on the grounds that "*the majority has failed to meet the Commission's responsibility under Section 204 of the 4R Act,*" and that *the Commission failed to "abide by the rules provided by the Congress"*;

(ii) the leader of the Commission's 5-member majority, former Chairman Stafford, refused to recuse himself from the decision-making process in *Ex Parte 319* in the face of a fully-documented motion for his recusal which charged that he had repeatedly exhibited in other forums an inherent bias or appearance of bias against any action Congress or the Commission might take to rectify the national rate structure for recyclable materials;[30] and

(iii) the United States, speaking for the Federal Energy Administration and the Environmental Protection Agency, also strongly urged that the Commission's report be "set aside in its entirety" because "the Commission's basic approach to this investigation was contrary to the legislative mandate" of Section 204 of the 4R Act.[31]

---

[30] See Pet. App. 321d.

[31] Brief of United States before the Court of Appeals in *NARI* v. *ICC,* No. 77-1187, at pg. 5.

Under these circumstances, clearly the Court of Appeals was obliged carefully to scrutinize the entire record and if, on balance, it found the dissenting Commissioners, the United States and the recycling industry to be correct in their contentions as a matter of law, this case necessarily had to be remanded to the Commission with instructions to comply with the Congressional mandate of Section 204 of the 4R Act.

II

THIS COURT'S 1973 AND 1975 DECISIONS UNDER NEPA IN THE *S.C.R.A.P.* LITIGATION ARE ESSENTIALLY IRRELEVANT TO THE COURT OF APPEALS' DECISION IN THIS CASE UNDER SECTION 204 OF THE 4R ACT OF 1976. NEVERTHELESS, THE COURT OF APPEALS' REMAND ORDER IN THIS CASE IS WHOLLY CONSISTENT WITH THIS COURT'S BASIC HOLDINGS IN *S.C.R.A.P.* AND IN WICHITA BOARD OF TRADE

The railroads speciously contend in their petition for certiorari that "the approach taken and the error committed below are virtually the same ones which led this Court to reverse the lower court in the *S.C.R.A.P.* litigation." Clearly, that contention is utterly baseless and frivolous. This Court's 1973 and 1975 decisions in the two *S.C.R.A.P.* cases, rendered under the National Environmental Policy Act of 1969 (NEPA) in the course of a nationwide general rate increase proceeding under Section 15(7) of the Interstate Commerce Act, are essentially irelevant to the Court of Appeals' decision in this case under a totally different statute—Section 204 of the 4R Act of 1976—and with reference to the Commission's failure to obey specific Congressional mandates in the course of a special statutory investigation of the base rate structure for recyclable materials only.

In *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 93 S.Ct. 2405 (*S.C.R.A.P. I*, 6/18/73), environmental groups obtained an injunction from a three-judge district court which prohibited the Commission from "permitting" and the railroads from "collecting" a 2.5% nationwide general rate increase applicable to all commodities insofar as goods transported for purposes of recycling were concerned. The district court ruled its power to grant the injunction was not barred by *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed. 2d 52, because the National Environmental Policy Act (NEPA) implicitly conferred authority on federal courts to enjoin any federal action taken in violation of NEPA's procedural requirements. This Court reversed, holding the district court *"lacked jurisdiction to issue the injunction"* because NEPA was not intended to repeal any other statute, including Section 15(7) of the Interstate Commerce Act as interpreted by *Arrow Transportation, supra.*

In the case at bar, the Court of Appeals issued *no injunction* of any kind; its remand order was issued in a statutory investigation conducted under Section 204 of the 4R Act of 1976, not in a nationwide general rate increase proceeding under Section 15(7) of the Commerce Act; and its entire decision is based on Section 204 of the 4R Act of 1976—*not* on the procedural provisions of NEPA. Thus, this Court's decision in *S.C.R.A.P. I* patently has no bearing whatsoever on the Court of Appeals' orders in this case.

As stated above, the Court of Appeals issued *no injunctive relief* of any kind in this case against either the railroads or the Commission. Rather, the Court simply remanded this case to the Commission for fur-

ther proceedings that comply with the Congressional mandate contained in Section 204. To that extent, its orders are wholly in accord with this Court's decision in *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade, supra,* rendered on the very same day in 1973 with this Court's decision in *S.C.R.A.P. I.* In *Wichita Board of Trade,* this Court ruled precisely the same as the Court of Appeals did in this case, to wit, *it remanded a case to the Commission for further proceedings "consistent with the [Commission's] mandate from Congress"* (see 412 U.S. 805-826). This Court thus concluded in *Wichita,* at 412 U.S. 826:

> "The action of the District Court is affirmed as to the remand to the Commission and is reversed as to the injunction suspending the proposed charges."

In *S.C.R.A.P. II,* environmental groups again challenged, *exclusively under NEPA,* the legality of an Environmental Impact Statement belatedly and grudgingly prepared by the Interstate Commerce Commission long after it had already approved a nationwide general rate increase on all commodities, including recyclable materials. Patently, that ruling is totally irrelevant to the Court of Appeals' remand orders in this case issued, *not* under NEPA and *not* in a nationwide general rate increase proceeding under Section 15(7) of the Commerce Act, but wholly under Section 204 of the 4R Act of 1976 in a special statutory investigation of the base rate structures for recyclable materials *only,* in which the Court of Appeals found the Commission had totally failed to comply with the statutory mandates contained in the governing statute, Section 204. Again, however, the Court of Appeals issued no injunctive relief; it simply remanded this

case to the Commission for proceedings consistent with the Congressional mandate of Section 204.

Indeed, Section 204 of the 4R Act itself is simply an appropriate, logical extension of this Court's directives in *S.C.R.A.P. II* as to how any discrimination in the base rate structures for recyclable materials should be rectified. In its opinion in *S.C.R.A.P. II,* this Court ruled that nationwide general rate increase proceedings under Section 15(7) of the Commerce Act are not proper vehicles for a detailed, comprehensive investigation of the base rate structures for recyclable materials. Mr. Justice White, writing for the Court, stated that the Commission necessarily had to conduct such a comprehensive investigation in a proceeding restricted to rates for recyclable materials (422 U.S. 324-326). Accordingly, this Court ruled that until the Commission conducted such a comprehensive investigation in a separate proceeding, recyclable materials would necessarily continue to be subject to any and all general rate increases, irrespective of the alleged discriminatory state of the base rate structures (422 U.S. 324-326).

Within six months after this Court's decision in *S.C.R.A.P. II,* Congress enacted Section 204 of the 4R Act and sent it to the President. In line with the rulings of this Court in *S.C.R.A.P. II,* it ordered the Interstate Commerce Commission *"within one year"* to conduct a thorough, special investigation of the base rate structures for recyclables, as well as the manner in which they have been affected by successive rate increases, and to rectify all rates the railroads themselves could not prove to be just, reasonable and nondiscriminatory.

Unfortunately, a 5-member majority of the Commission failed to comply with Section 204, and even when confronted with evidence of gross unreasonableness and discrimination produced by the railroads themselves, they arbitrarily refused to rectify the rate structures. In the words of the dissenting Chairman and Vice Chairman of the Commission (Pet. App. 323d):

> "This agency has been promising, and under section 204 was required, to resolve the longstanding question of whether the underlying rate structures for virgin materials and competing recyclable materials are unreasonable or discriminatory. The Supreme Court in *Aberdeen & Rockfish R. Co.* v. *S.C.R.A.P.* . . . recognized our discretion to select an appropriate proceeding to examine the issue. This was supposed to be that proceeding. I am sorry to state that we have failed to resolve the issue by neglecting to abide by the rules provided by Congress."

A fortiori, the Court of Appeals correctly remanded this case to the Commission with directives to obey the law—and in no sense do its remand orders raise the same issues which confronted this Court in either *S.C.R.A.P. I* or *S.C.R.A.P. II.*

III

THE COURT OF APPEALS DID NOT USURP THE COMMISSION'S SUBSTANTIVE AUTHORITY; IT DID NOT SIMPLY REWEIGH THE EVIDENCE OR SUBSTITUTE ITS JUDGMENT FOR THAT OF AN EXPERT AGENCY. RATHER, IT PROPERLY INTERPRETED THE RELEVANT STATUTORY PROVISIONS AND DECIDED ALL RELEVANT QUESTIONS OF LAW; AND LIKE THREE OF THE COMMISSIONERS THEMSELVES, IT CONCLUDED THE COMMISSION'S DECISION DID NOT REPRESENT REASONED COMPLIANCE WITH THE MANDATE EXPRESSED BY CONGRESS IN SECTION 204 OF THE 4R ACT

As stated above, the evidence the railroads themselves produced in *Ex Parte 319* established a *prima facie* case of extraordinary *rate discrimination* and *rate unreasonableness.* Rates charged for the movement of recyclables throughout the United States uniformly produce higher Revenue/Variable Cost Ratios for the railroads than rates charged for virgin counterpart materials; and the ratios for recyclables almost invariably stand at the very top of the rate spectrum —far higher in most cases than the established *"monopoly"* or *"market dominance" level,* albeit the transportation characteristics of recyclables are generally favorable to the railroads.

The railroads concede that, under Section 204(a)(2) of the 4R Act, they [the railroads] had the *statutory burden of proving that these rate structures are just, reasonable and nondiscriminatory. That, they failed to do,* but the Commission nevertheless refused to adjust the rates, holding *inter alia,* the railroads allegedly need the revenues, recyclable materials allegedly have poor "transportation demand elasticity," and the competitive relationship between recyclable materials and their virgin counterparts is not always absolutely perfect in all respects.

Essentially, the Court of Appeals ruled that, *as a matter of law under Section 204,* these are not acceptable *"excuses"* for an unreasonable, discriminatory rate structure—and unless the railroads, during the remand proceedings, can somehow carry their statutory burden of proof, the Commission, *again as a matter of law,* must adjust the rates. That holding is directly in line with this Court's decisions in *State of New York* v. *United States,* 331 U.S. 284 (1947) and *Interstate Commerce Commission* v. *N.Y., N.H., & Hartford R. Co.,* 372 U.S. 744, 753-758, 83 S.Ct. 1038, 1045-1047 (1963).

Long before the enactment of Section 204 in 1976, this Court uniformly held that the principal evil at which the entire Interstate Commerce Act has always been aimed is "discrimination in its various manifestations" (*Louisville & N.R.Co.* v. *United States,* 282 U.S. 740, 749; *State of New York* v. *United States, supra,* at 331 U.S. 296). Thus, the Interstate Commerce Act itself, especially Section 3(1), outlaws discrimination in any and all forms (*Dixie Carriers* v. *United States,* 351 U.S. 56, 60 (1956)), and it was written in the broadest possible terms so that it can effectively wipe out discrimination of every conceivable type (*Baltimore & O. R. Co.* v. *United States,* 333 U.S. 169, 175). In addition, Section 1(5) of the Commerce Act also provides:

"(5) *Just And Reasonable Charges*

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, *any every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."* [Italics supplied.]

The Court of Appeals thus correctly read Section 204 of the 4R Act of 1976 in the light of this long-standing statutory background and unbroken line of decisions of this Court. If rates are unjust, unreasonable or discriminatory, they are prohibited by law—and they cannot be sustained or foisted on the public simply because the railroads say they need the revenues, or traffic subjected to such rates is allegedly "demand inelastic". Indeed, the railroads' expert witness who developed the so-called "transportation demand elasticity" theory, nevertheless openly testified on the record in *Ex Parte 319* that, even if a commodity's "demand elasticity" is "poor," *that is not an acceptable reason for subjecting it to an unreasonable, discriminatory rate structure* (J.A. III, p. 1219). More specifically, he testified:

"Q. Would it be your testimony that in this case . . . unjust, unreasonable, discriminatory rates should be maintained in effect?

"A. No, I would not say that is the case.

"Q. You think they should be canceled, if they are found to be unjust, unreasonable or discriminatory?

"A. That is right. The Commission has that mandate anyhow."

In fact, the record before the Court of Appeals shows that, on October 5, 1977, after its decision in *Ex Parte 319,* the Commission itself reported to Congress under the 4R Act that *almost all other commodities moving by rail in the United States have low "transportation demand elasticities"* similar to those

alleged by the railroads for recyclables.[32] The record before the Commission itself is also replete with testimony of industrial recycling experts who estimate that establishment of reasonable, nondiscriminatory rates for the movement of recyclable materials will result in major increases in both recyclable rail traffic and concomitantly, increased revenues for the railroads. These experts also point out that the railroads can derive major revenue increases if they will adjust the rates for certain virgin natural resource materials to at least the "compensatory rate level."

Finally, *strictly in line with the mandate of Congress,* the Court of Appeals ruled that, *as a matter of law,* the Commission's treatment of the *"competitive relationship"* between virgin materials and their recyclable counterparts was too narrow. First, it must be understood that each virgin resource material and its recyclable counterpart are, in fact, *the same material merely in different form.* Secondly, it must be understood that the record before the Commission contains voluminous evidence that, in each industry, the virgin or primary materials and their recyclable or secondary counterparts are competing raw materials. For example, the Vice President of the American Paper Institute, the trade association for the paper manufacturing industry, testified (J.A. III, pages 1166-67):

"Q. Isn't it true that pulpwood and wastepaper, then, are competing commodities for the manufacture of pulp?

"A. Yes.

[32] See Commission's Report to Congress, October, 1977, "The Impact of the 4R Act Railroad Ratemaking Provisions."

"Q. Isn't it true that pulpwood and wastepaper and wood chips are all competing commodities to make pulp?

"A. They are the basic raw materials of the industry."

Thus, when Congress enacted Section 204 of the 4R Act, the Senate Commerce Committee Report in support of the legislation concluded, *as the Court of Appeals has now done in this case*:[33]

> "The record before the Committee indicates the Commission may not be taking into account the full competitive relationship between recyclable and recycled commodities, on the one hand, and virgin materials on the other . . . ."

And, when Section 204 reached the Senate floor in late 1975, Senator Tunney, one of its authors, stated:

> ". . . the investigation must proceed with an articulation of a presumptive standard of competition. For the purpose of this investigation, the Commission must consider recyclable and virgin materials to be competing if they are functionally equivalent in the manufacturing stage."[34]

The Commission, of course, ignored all these Congressional directives, and even ruled on many issues contrary to longstanding principles of law under the Interstate Commerce Act, specifically carried forward by Congress into Section 204 of the 4R Act of 1976. *Ergo,* the Court of Appeals properly corrected these errors of law and remanded the case to the Commis-

[33] See U.S. Code and Adm. News, Vol. 1, 94th Cong. 2d Sess., pg. 57.

[34] See Cong. Record, 12/4/75, Vol. 121, No. 178, p. S-21031.

sion, and by so doing, it did not invade any "reasoned exercise of expertise" by the Interstate Commerce Commission within the scope of this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U.S. 519, 558 (1978). In fact, by remanding the case to the Commission for compliance with its Congressional mandate, the Court of Appeals strictly followed the directives of this Court: "If the decision of an agency is not sustainable on the administrative record made, then the decision must be vacated and the matter remanded for further consideration" (*Camp* v. *Pitts,* 411 U.S. 138, 143, 93 S.Ct. 1241, 1244 (1973); *F.P.C.* v. *Transcontinental Gas Pipe Line,* 423 U.S. 326, 331, 96 S.Ct. 579, 582 (1976).

IV

THE COURT OF APPEALS DID NOT USURP THE COMMISSION'S PROCEDURAL AUTHORITY BY REQUIRING, IN LINE WITH TWO SUCCESSIVE CONGRESSIONAL MANDATES FOR EXPEDITED ACTION, THAT THE PROCEEDINGS ON REMAND IN THIS CASE BE COMPLETED WITHIN SIX MONTHS. THE COMMISSION ITSELF HAS NOT SOUGHT CERTIORARI ON THIS ISSUE, AND IS EXPEDITIOUSLY SEEKING TO COMPLY. SHIPPERS OF RECYCLABLE MATERIALS AND THE NATION'S URGENT, VITAL INTEREST IN MAXIMIZED RECYCLING OF RESOURCES, IN TURN, WILL CONTINUE TO SUFFER VAST, IRREPARABLE DAMAGE UNTIL THE RATE STRUCTURE IS FULLY RECTIFIED UNDER SECTION 204 OF THE 4R ACT SO CLEARLY EXPEDITED ACTION ON REMAND IS IMPERATIVE.

The railroads, which benefit immeasurably from any and all delays in rectification of their unreasonable, discriminatory rate structures for recyclable materials, naturally want to postpone the day of final reckoning in this case as long as possible. To date, they have succeeded in doing that—

(1) for *five years,* since Congress directed the Commission, in Section 603 of the 3R Act of 1973, to eliminate all discriminatory rates for recyclables *"by expedited proceedings,"* and

(2) for *three years,* since Congress directed the Commission, in Section 204 of the 4R Act of 1976, to remove all unreasonable, discriminatory rates for recyclables *"within one year"* from *February 5, 1976."*

In the meantime, during the period from 1973 *to date,* shippers of recyclable materials have been forced to shoulder, on top of the apparently grossly unreasonable, discriminatory base rate structures, a series of rate increases totaling roughly 50% in most cases—or approximately $153,000,000 per year in increased shipping costs. Thus, while the railroads and the Commission continue to ignore and defeat the statutory mandates of Congress, the national recycling industry has been subjected to an ever-increasing rate unreasonableness and discrimination, and huge, irreparable injury and loss which continues to become more and more oppressive each year.

Such delays have also operated, and will continue to operate, to postpone the day of maximized industrial recycling and resource recovery in the United States, with resulting irreparable energy and natural resource losses of incalculable value to the nation. Solid waste disposal relief to cities and states throughout the country has similarly been delayed, again with huge, irreparable dollar losses and unnecessary depletion of shrinking available landfill space within which to dump the growing volumes of unrecycled solid waste (see *City of Philadelphia* v. *New Jersey,* —— U.S. ——, 98 S. Ct. 2531 (1978)).

Finally, under the provisions of Section 461 of the National Energy Conservation Policy Act of 1978, *supra,* the Secretary of Energy is confronted with a Congressional mandate to establish annual targets for maximum increased energy-saving industrial recycling in the nation's major energy-intensive industries during the period from 1979 through 1987. Until economic barriers to maximum recycling—mainly unreasonable, discriminatory freight rates—are removed, the contemplated targets and resulting energy conservation will surely suffer severely.

Confronted with these facts—and especially the specific Congressional mandate that all unreasonable, discriminatory freight rates for recyclables be removed by February 5, 1977 (one year after the enactment of the 4R Act of 1976)—the Court of Appeals correctly sought to give appropriate, belated force and effect to the Congressional directives by ordering the Commission expeditiously to complete proceedings on remand herein within six months from October 16, 1978—*a date roughly two years and two months after the date fixed by Congress in Section 204 of the 4R Act* (Pet. App. C).

This requirement, imposed pursuant to the two Acts of Congress, is entirely reasonable and necessary, not only to give as much meaning and force to the one-year Congressional mandate of Section 204 as is still possible at this late date, but also because it is consistent with other specific time limits prescribed by Congress for similar Commission actions. For example, Congress placed a *7-month time limitation* on the Commission's ability to investigate nationwide rate increases proposed by the railroads under the Interstate Commerce Act (49 U.S.C. 15(7)); and under Section

201 of the 4R Act of 1976 itself, Congress placed a specific *6-month (180 day) time limitation* on the Commission's establishment of standards and procedures for the division of joint rates and fares (49 U.S.C. 15(6), as amended). Finally, Congress placed a *9-month time limitation* on the issuance of Commission orders in similar rate proceedings, and in order to assure Commission compliance, Congress provided at 49 U.S.C. 15(6)(b):

> "If the Commission is unable to issue a final order within such time, it shall issue a report to Congress setting forth the reasons for such inability."

The Commission, of course, has *not* sought certiorari on this issue. Rather, it is proceeding expeditiously with the remanded investigation, and has established a schedule which will enable it to complete all proceedings within the six-month period—including any adversary hearing procedures that are necessary. Moreover, as Judge Leventhal stated with reference to this phase of the case (Pet. App. C, pg. 2c):

> ". . . under the present order, the ICC can return and ask for an extension of time."

Under all these circumstances, the Court of Appeals' order of October 16, 1978 does not usurp the ICC's procedural authority within the meaning of either *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U.S. 519 (1978) or *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.,* 423 U.S. 326, 96 S.Ct. 579, 46 L.Ed. 2d 533 (1976). Here, Congress itself imposed specific, clear-cut statutory mandates for *"expedited proceedings" and completion of the Commission's investigation of the challenged freight rates by February 5,*

1977, and at this late date, in *1979*, the Court of Appeals' order simply *seeks to enforce those Congressional mandates to the greatest degree still humanly possible.* Here also, the Court properly exercised its equity powers, and in the face of *"compelling circumstances"* and with *"substantial justification,"* directed the Commission and the railroads, which have literally been "toying" with the vitally important issues involved in this case for almost a decade, to complete proceedings on remand within a reasonable time period (see *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 311-312, 94 S.Ct. 2328, 2347, 41 L.Ed. 2d 72 (1974)). In this regard, this Court's *remand order in FPC* v. *Transcontinental Gas Pipe Line Corp.*, at 423 U.S. 334, 335, is instructive:

> "In light of the immediacy of the natural gas shortage problem with which the Commission is attempting to cope, the already protracted nature of review proceedings in this case, and the potential importance of a resolution on the merits . . . of the issues presented by the instant case, *swift and priority consideration of this case . . . on remand is merited.*" [Italics supplied.]

Essentially, that is the same type of order the Court of Appeals issued to the Commission in this case.

CONCLUSION

For all the reasons stated above, the railroads' petition for writ of certiorari should be denied. When the Commission completes its current proceedings on remand, this case will be ripe for full, final judicial review—and in light of the Congressional mandates *"for expedited proceedings"* and *expedited removal* of any and all unreasonable, discriminatory rates for recyclable materials, the statutory scheme and the interests of justice would clearly be defeated by further judicial review processes at this time.

Respectfully submitted,

EDWARD L. MERRIGAN
Attorney for Respondents NARI, et al.
6000 Connecticut Avenue, N.W.
Washington, D.C. 20015

January 3, 1979

CERTIFICATE OF SERVICE

Copies of this brief in opposition to the railroads' petition for certiorari were served by first class mail this 3rd day of January, 1979, addressed to Harry N. Babcock, Esq., 2700 Terminal Tower, P. O. Box 6419, Cleveland, Ohio 44104; to Richard W. Kienle, Esq., 8 North Jefferson Street, Roanoke, Virginia 24042; to William C. Leiper, Esq., P. O. Box 536, 600 Grant Street, Pittsburgh, Pennsylvania 15230; to John A. Daily, Esq., 1138 Six Penn Center Plaza, Philadelphia, Pennsylvania, 19104; to Michael Boudin, Esq., and Timothy A. Harr, Esq., 888 Sixteenth Street, N.W., Washington, D.C. 20006; to James L. Tapley, Esq., and James L. Howe, III, Esq., P. O. Box 1808, Washington, D.C. 20013; to James E. Sykes, Esq., 222 S. Riverside Plaza, Chicago, Illinois 60606, attorneys for the railroads; to the Solicitor General of the United States; to Gould, Reichert & Straus, Esqs., 2613 Carew Tower, Cincinnati, Ohio 45202, attorneys for respondent ISIS in the companion case; and to all other known attorneys for interested parties.

/s/ EDWARD L. MERRIGAN